United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7601

To be argued by:
David S. Heller, Esq.

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P/S

United States Court of Appeals

For the Second Circuit

WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Plaintiffs-Appellants,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN, AND HUGH CAREY,

Defendants-Appellees.

On Appeal From The United States District Court
For The Eastern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

LESTER E. FETELL, Counsel
and DAVID S. HELLER
Attorneys for Plaintiffs-Appellants
231 West 29 Street
New York, N.Y. 10001

LESTER E. FETELL, Esq.

DAVID S. HELLER, Esq.

CARREN KLEINMAN, Esq.

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STATEMENT

Defendant-Appellees New York State Board of Elections and the Secretary of State and Governor Hugh Carey have submitted Briefs in Opposition to that of Plaintiff-Appellants. The Board of Elections of the City of New York and Betty Dolen have chosen to adopt the position of the two briefs submitted by the other Defendant-Appellees insofar as the

arguments therein apply to their position. Hereinafter, for the sake of convenience, Defendant-Appellees will be referred to as defendants, and Plaintiff-Appellants as plaintiffs.

The points raised by the defendants' briefs are adequately disposed of in the Plaintiffs' brief previously submitted to this Court. However, because defendants have phrased their arguments in novel, and potentially confusing ways, plaintiffs believe that in order to maintain clarity in the presentation of this appeal, they must point out the erroneous reasoning contained in the defendants' briefs.

The defendants initially attack the District Court's ruling, without specifically assigning error, by re-arguing their motions to dismiss on jurisdictional grounds. See New York State Board of Elections Brief, Point I, and Brief of Secretary of State and Hugh Carey at page 13. Suffice it to say that the State Board's brief contains two erroneous statements of fact, which are easily set to right.

1. Plaintiffs have *not* limited their appeal to the District Court's erroneous statement of the law under 42 USC 1983 and 1985, but have specifically appealed from the Trial Court's disposal of their cause of action under 28 USC 1331 (a) wherein the Trial Court used an erroneous interpretation of the substantive law of elections as evolved under 1983 and 1985. (See 85a). That the non-human defendants were properly before the Court pursuant to the Court's 1331 (a) jurisdiction and not its jurisdiction pursuant to 42 USC 1983 and 1985 is not an issue. The Trial Court clearly and correctly held that these defendants *were* properly before it, and subject to the same standards as are individuals sued under 42 USC 1983. Thus the Trial Court used the same standard for the plaintiffs' 1331 (a) claims as for their 42 USC 1983 and 1985 claims. See the Trial Court's Memorandum of Decision and Order dated December 7, 1976 generally, and particularly at 63a-64a and footnotes 10-13 thereof at 73a-74a. Defendants are apparently attempting to bootstrap their 1983 non-suable status into total immunity, without the formality of a cross-

appeal. Suffice it to say that they are not immune, as Judge Mishler properly held. If the Trial Court used an erroneous standard of substantive law to decide this case, and the case is retried on a proper, civil standard, the non-human defendants will be properly subject to liability.

2. The dismissal of the 1331 (a) cause of action *has* been appealed, contrary to defendants' statement on page 3 of the State Board's brief. Again, see 85a.

It should be noted that defendant Dolen, as an individual person, cannot join in this argument, and concedes jurisdiction under 1983.

Defendants first fall-back position is to the effect that the issue is moot. Plaintiffs have shown that the issue is not moot. Defendants now advance the ingenious contention that the trial court never applied the standard it decreed. See State Board's brief Point II, and Secretary of State and Governor Carey's brief Point II and Point II page 11. The Secretary of State and Governor Carey also argue mootness in a more conventional fashion. These two contentions, the ingenious and conventional arguments of mootness, are equally false.

The argument that the trial court never applied its own standard is simply contrary to the demonstrable facts of the case. The defendants moved to dismiss. The Court *denied* their motion on December 7, 1976 (60a *et seq.*) and held that a cause of action existed. The claim that the Court below found *no* cause of action, yet denied a motion to dismiss, and called for a full hearing, page 3 Secretary of State and Governor Carey brief, is either a misprint or else the key to the fallacy of the defendants' too-clever argument. The Trial Court plainly would not, and could not do such a thing. That Court held that the complaint was inartfully drawn, and, having evolved the standards which are the subject of this appeal, *directed that the pleadings be amended to conform to the proof as measured by these standards 69a-70a.* The Trial Court subsequently dismissed the complaint for failure to meet these very standards 83a-84a. Defendants now claim

that the Trial Court denied their motions, directed amendment of the pleadings, held a two-day hearing whose sole subject was the measurement of the plaintiffs' evidence by the Court's standards, evaluated the results of that hearing and wrote an opinion dismissing the complaint without "applying" the standards. The reasoning behind this claim is not set forth. In fact, the very paragraph from the Court Decision (84a) set forth with emphasis at page 4 of the State Board's brief *is* the Trial Court's application of the erroneous standard under appeal. All the contested elements of "fraud" are set forth. Compare this paragraph to the Court's initial statement of its standards found at 69 (a). Thus the ingenious argument of mootness is too clever by half — and totally specious on close examination. In fact, in a moment of candor, the Secretary of State and Governor Carey *admit* "the District Court...applied the criteria found at 62 (a), (1), (2), (3) and (4)." (page 12 brief).

The conventional mootness argument advanced by the State Board (page 4-5 of its brief) and by the Secretary of State and Governor Carey (Point I) fares little better. It is true, as plaintiffs pointed out in their brief, that re-running the 1976 Presidential Election at this late date is impractical. However, the defendants, who were legally responsible for administering an election wherein each citizen's vote was cast with its full undiluted value, and for certifying the results thereof (as the Trial Court held 63a *et seq.*) are liable for injunction against conducting future substandard elections, and for damages for their non- or mis-feasance in the instant case. In fact, the defendants Secretary of State and Governor Carey *prove* in their brief that the case is not moot. On page 8 of their brief they ask for dismissal. They claim on page 9 that future election abuses are merely conjectural. On page 10 they claim that there is no basis for any relief as the election was perfectly valid. They therefore wish the Court to certify this and all subsequent elections under their administration. Yet on page 13 they *guarantee* this Court that *"Errors and irregularities*, even if accepted as frauds, *are inevitable*..." (emphasis added). Thus, they demonstrate that

they *know* that the abuses *found by the Trial Court* 80a, 82a, 83a *will* repeat. And at such time as they "inevitably" repeat — whether in aggravated or better concealed form — defendants will *again* seek to evade review. This is the paradigm for invocation of the *Southern Pacific Terminal* doctrine, as plaintiffs have shown in their brief in chief. This case is not moot.

Finally, at their final fall-back position, defendants address the merits. State Board's brief Point III, Secretary of State and Governor Carey brief page 12. This point is sufficiently argued in palintiffs' brief. Defendants seek to change the issue by mis-stating it as an equal protection claim, thereby putting it within the rule of *Village of Arlington Heights v. Metropolitan Housing Development Corporation* — U.S. — 45 LW 4073 and *Washington v. Davis*, 426 U.S. 229 (1976). This is the error of the District Court. See Plaintiffs' brief in chief pages 12-17. The Federal Courts have recognized that *First Amendment Cases*, especially in the area of electoral rights, are *fundamentally different from equal protection cases*. A recent decision applying this very distinction was handed down in a case brought by the U.S. Labor Party, a plaintiff herein. The case of *Rose v. Hanly* 77 C 326 (N.D. Ill., March 14, 1977) is directly on point with regard to the propriety of an intent standard in an election case. The Court's attention is called to pages 5-7 thereof where *Washington* and *Arlington Heights* are distinguished. As Judge Decker said:

> "The defendants ignore the fact that the instant cases assert due process claims raising first amendment issues. Defendants are in error when they assert that questions of ballot access are cognizable only under the equal protection clause." *Rose v Hanly*, 77 C 326, at page 6.

The court in *Hanly* then reviewed *William v. Rhodes*, 393 U.S. 23, 30-31 (1968) and eight of its progeny (page 7) all of which show conclusively that the recent decisions of *Washington v. Davis*, supra, and *Village of Arlington Heights*

cannot be read to import an intent requirement into the law of elections. This is the error that the Trial Court committed, and that defendants would have the Court adopt. However, Judge Decker's opinion expresses the b[illegible]soned, and nearly universally accepted rule of law. See Pla[illegible]tiffs brief in chief pages 12-17. Needless to say, the defenda[illegible]s reliance on a cruel and unusual punishment case *Estelle v. Gamble*, — U.S. — 45 LW 4023, is inapposite.

CONCLUSION

The Trial Court agreed with plaintiffs that a dismaying, pervasive pattern of irregularity ran through the 1976 Presidential Election in New York State. That Court agreed with plaintiffs that the named defendants were charged with conducting and certifying clean, regular elections. He agreed that they were liable in damages and to injunctive relief should they fail in their duty. He erred, plaintiffs submit, in positing that a showing of "fraud" — including an element of quasi-criminal, subjective, wrongful *intent* — is an essential element of recovery. Nothing stated in defendants' briefs explains or justifies that error. The law, as most recently held by Judge Decker, is contrary to that applied below in the case at bar. This Court should reverse this error and remand for appropriate proceedings consistent with a proper rule of law.

Respectfully submitted,
LESTER E. FETELL, Counsel
and
DAVID S. HELLER
Attorneys for Plaintiffs-Appellants

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DAVID S. HELLER, ESQ.
CARREN KLEINMAN, ESQ.
On the brief.

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AFFIDAVIT OF SERVICE

GERALD P. KAUFMAN, being duly sworn, deposes and says,

1. I am over 18 years of age and not a party to this action.

2. I hereby certify that I served a copy of the Reply Brief For Plaintiffs-Appellants in the above-entitled case by personally serving copies to: 1. Hon. Louis J. Lefkowitz, Attorney General for the State of New York, Attorneys for Hugh Carey and Secretary of the State of New York, 2 World Trade Center, New York, New York; 2. Bernard Richland, Esq., Corporation Counsel for the City of New York, Attorneys for Betty Dolen and the Board of Elections of the City of New York, 1656 Municapl Building, New York, New York 10007; and by mailing copies of same to David E. Blabey, Esq., Attorney for New York State Board of Elections, 194 Washington Avenue, Albany, New York 12210.

Sworn to before me this
29 day of April, 1977

Gerald P. Kaufman
Gerald P. Kaufman

Marie Mendez
MARIE MENDEZ
Notary Public State of New York
No. 31-4620518
Qualified in New York County
Commission Expires March 30, 1979